

REMARKS

Claims 1-25 are pending. No claims are amended in this communication.

35 U.S.C. § 103

The Examiner rejected claims 1-25 under 35 U.S.C. § 103(a) as being unpatentable over Gehrman et al. (U.S. Patent No. 4,518,696) in view of Desai et al. The Examiner identified Desai et al. as being U.S. Patent No. 4,867,696. Applicant presumes that the Examiner was referring to U.S. Patent No. 4,867,986, issued to Desai et al. on September 19, 1989. Applicant respectfully traverses the rejection.

The Office Action indicates that Gehrman discloses a composition comprised of liquid suspensions of various species of lactobacillus provided as a dispersion of cells in sunflower seed oil. However, as the Office Action notes, Gehrman does not teach the claimed limitation(s) of fish oil or antioxidants in combination with a vegetable oil. Rather, the Office Action relies upon the teachings of Desai to provide the claims limitations of fish oil and antioxidants, and further goes on to indicate that Desai may be combined with Gehrman to obviate all claims.

The first criteria to establish a *prima facie* case of obviousness is that there must be some suggestion or motivation either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to combine the reference teachings. MPEP 2142-2143. In re Vaack, 947 F.2d 488, 20 USPQ 2d 1438 (Fed. Cir. 1991). Applicant again submits that there is no motivation to combine the Desai reference with the Gehrman reference.

First, the Gehrman reference and Desai reference disclose two distinct forms of delivery. Gehrman discloses a *liquid suspension* of dry viable Lactobacillus cells in sunflower seed oil. Desai et al. teaches a *microemulsion* of marine animal oils, present as microspheres or macrospheres, encased within gelatin. Due to the distinct forms of the references, i.e., a *liquid*

versus a gel, it is not reasonable to infer that the combination of the references would in fact lead to the formulation of a stabilized and shelf-stable mixture for use in various product mixtures.

Secondly and most importantly, the **Gehrman reference teaches away** from the Examiner's suggested combination with Desai. In general, a **reference may be said to teach away** from its combination with a second reference **if a person of ordinary skill in the art, upon reading the first reference, would be led in a direction divergent from the path that was taken by the Applicant.** In re Gurley, 27 F.3d 551, 31 USPQ 2d 1130 (Fed. Cir. 1994). As stated previously, the **Gehrman reference teaches away** from utilizing the elements of Desai because the **Gehrman reference states that sunflower seed oil is preferably the only liquid ingredient** of the medium. *See* Column 2, lines 61-63 of Gehrman. Even more explicitly, the Gehrman reference states that testing the preservation properties of other oils leads to the conclusion that, **"...sunflower oil has special properties for maximizing the preservation of Lactobacilli in oil suspension."** *See* Column 5, lines 21-23. **Not only would combining the fish oil and antioxidants of Desai with Gehrman nullify the desired invention of Gehrman, i.e., a suspension medium having sunflower oil as its only liquid, it would also be contrary to the teaching of Gehrman which explicitly categorizes sunflower oil, as having special, advantageous preservation properties.** In light of the Gehrman reference, it cannot reasonably be said that a person skilled in the art would infer that the addition of fish oil or antioxidants would result in the formulation of a stabilized and shelf-stable mixture in light of the special preservation properties of sunflower oil as described by Gehrman. Instead, it is more likely that a person of reasonable skill in the art would avoid adding the fish oil and antioxidants of Desai for fear of detrimentally effecting the special preservation properties of sunflower oil as described by Gehrman. Furthermore, it cannot reasonably be asserted that a person skilled in the art would be motivated to combine the fish oil and antioxidants of Desai such that the sunflower

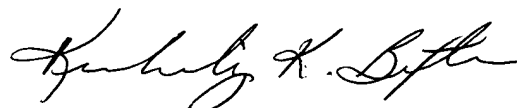
oil of Gerhman, including its special preservation properties, is present at a weight percent of only 45-55% as claimed by the present invention.

Lacking such inferences, there can be no motivation to combine Desai with Gehrman. As such, Applicant respectfully submits that a case for *prima facie* obviousness has not been met and requests that the rejection to all pending claims under 35 USC § 103(a) be withdrawn.

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kimberly K. Baxter".

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